



THE COURT OF APPEAL

Record Number: 87/21

**The President
Kennedy J.
Ní Raifeartaigh J.**

BETWEEN/

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/

- AND -

DANIELIUS KURKLINSKAS

APPELLANT

JUDGMENT of the Court delivered (ex tempore) on the 24th day of January 2022 by Ms. Justice Kennedy.

1. This is an appeal against severity of sentence. The appellant pleaded guilty to two counts on the Bill of Indictment, Count 2, possession of a controlled drug for the purpose of sale or supply contrary to s. 15 of the Misuse of Drugs Act, 1977 and Count 3, the cultivation of cannabis plants contrary to s. 17 of the Misuse of Drugs Act, 1977.

On the 19th April 2021 the appellant was sentenced to four and a half years' imprisonment in respect of each count, to run concurrently and backdated to the 18th August 2020.

Background

2. On the 12th August 2020 Gardaí obtained a search warrant from Dundalk District Court pursuant to s. 26 of the Misuse of Drugs Act 1977 for an address in Dundalk, County Dublin in the context of believed cultivation. On the 18th August 2020, a search was

conducted by Gardaí by way of execution of that search warrant of the premises at that address in Dundalk, County Dublin.

3. On arrival at the address, Gardaí forced entry into the property and identified themselves as members of the Garda Síochána and that they had a search warrant. Gardaí noted that all of the windows were closed, despite it being a warm morning. They explored all three floors of the property and subsequently discovered roughly 8kg of cannabis herb hanging from the ceiling, seventy mature cannabis plants and one hundred and four cannabis plant saplings. The appellant was found, in bed, on the top floor of the property and a small amount of loose green-like plant substance was scattered around his bed. He identified himself by producing his Lithuanian passport. There was a bathroom adjacent to his bedroom with two more mature cannabis plants. Items associated with cannabis cultivation were found on the top floor and in the kitchen, as well as, a large vacuum packed bag of cannabis herb. The total value of the drugs seized amounted to €219,784. Gardaí declared it a sophisticated grow house with an irrigation system and the electricity meter having been interfered with to support the plant's growth.
4. At approximately 8:35am on the 18th August 2020, the accused was arrested on suspicion of an offence contrary to s.15 of the 1977 Act and brought to Dundalk Garda Station. In interview, the appellant exercised his right to silence in respect of some questions and disavowed all knowledge of cultivation or of any cannabis of any substance being present on the premises in respect of others. The appellant was said to have been respectful to the Gardaí but not cooperative. He entered a guilty plea at an early stage.

Personal circumstances of the appellant

5. The appellant was twenty-three years of age at the time of sentencing and has no previous convictions. He was said to have come from a good background in Lithuania. He left school at 18 and worked various jobs, forklift driving and working as a general operative in a small factory, before becoming a window fitter with which job he travelled to Reykjavik, Iceland. Due to the outbreak of Covid-19, the appellant was caused to return to Lithuania where he had no employment. He was offered an opportunity to come to Ireland to make some money before returning to Lithuania.

The sentence imposed

6. The court identified a headline sentence of seven and a half years imprisonment in respect of Count 2, possession of a controlled drug for the purpose of sale or supply, contrary to s. 15 of the 1977 Act and a headline sentence of eight years imprisonment in respect of Count 3, cultivation of cannabis plants contrary to s. 17 of the 1977 Act. In assessing the gravity of the offence, the court noted that the appellant was not a man with issues or difficulties and that the offending was for financial gain.
7. In terms of mitigation, the court took into account the appellant's early plea of guilty, his being a Lithuanian national with limited English which would compound his difficulties whilst serving a sentence and limited access to his family. The court also considered his good work history and good behaviour while in custody that is supported by way of a Governor's Report.

8. Having considered the mitigating factors, the judge reduced the headline sentences. The sentence for Count 2 was reduced to one of four and a half years' imprisonment and the sentence for Count 3 was reduced to one of four and a half years' imprisonment also. Both sentences to run concurrently and backdated to the 18th August 2020.

Grounds of appeal

9. It is submitted on behalf of the appellant that the sentences imposed were excessive in all of the circumstances.

Submissions of the appellant

10. Counsel for the appellant submits that the judge failed to take properly into account the background of the appellant and the prevailing mitigating circumstances, pointing to the appellant's age and no previous convictions, his good work history, his good behaviour in custody and his intention to return to Lithuania upon his release from his sentence.
11. It is submitted that the appellant's lack of previous convictions is significant in terms of mitigation and that the judge failed to take properly into account this factor.
12. Counsel for the appellant also points out that he arrived in this jurisdiction on the 7th August 2020, 11 days before the detection of the offending and that he has no ties to this jurisdiction, no family present and requires the services of a translator.

It is submitted that the appellant's status as a non-national will render his experience of imprisonment more onerous and that this is well-accepted and reflect in existing sentencing practice. Counsel for the appellant makes reference to *People (DPP) v. Pavlak, ex tempore*, Court of Criminal Appeal, 17 December 2008 and *People (DPP) v. Wharrie* [2016] IECCA 1, in this regard.

13. The appellant notes the court's unwillingness to suspend any element of his sentence on the basis that he was not a man with issues or difficulties and that he had instructed his legal representation that it was his intention to return to Lithuania upon the execution of his sentence, he relies on the judgment of the *People (DPP) v. Broe* [2020] IECA 140, in this regard, wherein it is stated:

"...suspending a sentence in whole or in part will often be an appropriate way of reflecting mitigating circumstances, particularly where amongst the factors which the sentencing judge wants to reward is progress towards rehabilitation or reform to date, and where he/she also wishes to incentivise continuation along that path.."

While it is accepted that rehabilitation was not a matter for consideration in this instance, it is submitted that the judge should have considered aspects of reform and the appellant's intention to return home to Lithuania upon the execution of his sentence and engage in gainful employment.

14. It is submitted that the appellant was given a disproportionate and excessive sentence in all the circumstances, that the judge fell into error, one of principle, by incorrectly placing on the scale of severity the particular offence and failing to consider either adequately or

at all the possibility of imposing a non-custodial or part suspended sentence sanction in this case.

Furthermore, it is contended that the judge failed to take the appellant's tender age and background into account, most significantly that he had no previous convictions.

Submissions of the respondent

15. It is submitted by the Director that this is not a case of an individual involved in cultivation in the type of small-scale operation where the accused is involved only with immediate family or friends, or where the defence is made that the cultivation was to "feed" the habit of the grower, or the cultivation had some pseudo-medicinal purpose for the grower or a loved one. It is pointed out that unlike what are often referred to as "gardening cases" the appellant admitted to travelling for the purposes of financial gain. It is submitted by the Director from her experience of other cultivation case that the role of this appellant was at a more senior level of financial benefit than many so-called "gardeners" that have come before this Court.

It is noted that the appellant was not living in hardship and had some of his product on his bed when apprehended. In comparison to other "gardeners", the Director contends that this appellant was not brought to Ireland from a position of comparative poverty to live in limited and confined contact with very little or no contact with the outside world and little more above subsistence by way of material reward. It is submitted by the Director that nothing urged on behalf of the appellant suggests the "borderline slavery" presented by others, pointing to the appellant's business background.

16. Furthermore, the Director submits, looking to the industrial operation in terms of the charge of cultivation and the six-figure valuation of drugs in terms of sale and supply, that the case had to be viewed as one at the higher level in respect of each of the two counts and that the sentence imposed did reflect the difficulties which the respondent will encounter as a foreign national with limited English incarcerated in this country. Attention is also drawn to the fact that the appellant was prepared to work in Iceland in the past and thus evidenced a willingness to work far away from home and in a foreign country with its foreign language and culture. It is therefore submitted that foreign working was less of a burden for the appellant than others.
17. In the respondent's view, the court was considered and careful and acted within principle in imposing sentence, noting that the maximum sentence for sale and supply is life imprisonment and that the maximum sentence for cultivation is 14 years.

Reference is made to *DPP v. O'Driscoll* [1972] 1 Frewen 351 wherein Walsh J stated:

"the objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the Courts to pass what are the appropriate sentences in each case having regard

to the particular circumstances of that case - not only in regard to the particular crime but in regard to the particular criminal.”

18. The Director concludes that the sentence was apt in all the circumstances and within discretion.

Discussion

19. In oral presentation, Mr. McGrath SC on behalf of the appellant succinctly argues that the judge erred in the nomination of the notional headline sentences, moreover that insufficient credit was given for the mitigation present.

He highlights that the appellant is a young man whose role was that of tending to the plants in question, that he was in the country for a period of 11 days, whereas the plants were at a stage of growth beyond that. He does not seek to gainsay that the appellant was involved in this exercise for financial purposes, but states that the sentence was excessive in all the circumstances.

20. There can be no doubt but that this was a sophisticated operation where the value of the controlled substance was very high indeed. Whilst the primary focus concerns the cultivation count, the Court cannot and, is not invited to, ignore the high value of the substance in question.

However, in our view, the fact that the appellant came to this jurisdiction with a financial objective in mind, elevates his culpability. The grow house was a sophisticated operation of considerable value and whilst his role was that of tending to the plants, it was an invaluable and essential role in the operation of the enterprise. The fact that he did so purely for financial gain, with no evidence of coercion or hardship renders his culpability of a significant order. In the circumstances, in conjunction with the other aggravating factors, We find no error in the nomination of the pre-mitigation sentences.

21. Insofar as mitigation is concerned, the plea of guilty was entered at an early stage, he is a young man, a non-national with limited English and limited access to family which impacts on his incarceration, his recent bereavement, and his work history. The prison Governor’s report states he is at an enhanced privilege level. In light of the mitigation, the judge reduced the notional sentences in respect of both offences to one of 4 ½ years imprisonment.

22. Mr. McGrath emphasises the value of his early plea and that remorse is to be found therein, the absence of previous convictions and his youth. However, the judge carefully took into consideration the mitigating factors and afforded a generous discount to take account of these factors, and, accordingly we are not persuaded that the judge erred in her approach and consequently, we dismiss the appeal.